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No. 09-265

Supreme Court, U.S.
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In The
Supreme Court of the United States

INDEPENDENCE INSTITUTE,

Petitioner,

v.

BERNIE BUESCHER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Colorado

BRIEF OF THE CATO INSTITUTE, WYOMING LIBERTY GROUP, CENTER FOR COMPETITIVE POLITICS, SAM ADAMS ALLIANCE, MONTANA POLICY INSTITUTE AND GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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OTHER SOURCES:

A Buyer's Guide to Ballot Measures: The Role of Money in 2002 Ballot Initiative Campaigns (Ballot Initiative Strategy Center Foundation, March 2003) 8

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Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared*, WASH. POST, Jul. 1, 2007 at B3 22

David S. Broder, *Union Dues Intitiative Causing Divisions for Nevada GOP*, WASH. POST, May 5, 1998 at A04 21

Earl Caldwell, *Martin Luther King Is Slain in Memphis; A White Is Suspected; Johnson Urges Calm*, N.Y. TIMES, Apr. 5, 1968, at 1 14

Citizens United v. FEC (08-205) oral argument transcript at 66 10

Dogs, Kids, & Clubs, TIME, May 10, 1963, at 19 14

John Ehrenberg, *Civil Society: The Critical History of an Idea*, ch. 6 (1999).....7

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John R. Lott Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides*, WALL STREET J., Dec. 26, 2008, at A13.....15

Douglas O. Linder, Lynching Statistics by Year, http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html 14

Dennis Polhill, INITIATIVE AND REFERENDUM IN COLORADO (Initiative and Referendum Institute, Dec. 2006) 5

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David Primo, *Public Opinion and Campaign Finance*, Cato Institute Briefing Paper (Jan. 31, 2001) 9

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Donna St. George, *31 Years Later, Mississippi Seeks Justice for Medgar Evers' Murder*, KNIGHT RIDDER/TRIB. NEWS SERVICE, Jan. 24, 1994 14

Brad Stone, *Disclosure, Magnified On the Web*, N.Y. TIMES, Feb. 8, 2009, at A3 15

Steve Suo and Jeff Mapes, *Measure 8 Sponsors Won't List Donors*, OREGONIAN, Dec. 9, 1994 at D09 22

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute, Wyoming Liberty Group, Goldwater Institute Scharf-Norton Center for Constitutional Litigation, Montana Policy Institute, and Sam Adams Alliance are a variety of nonpartisan public policy research organizations, each advancing the principles of liberty, free markets, and limited government in their own capacity. Each group supports public policy founded on these principles through research, studies, policy briefings, forums, and editorials. The Center for Competitive Politics is a nonprofit advocacy organization that works to protect and promote the First Amendment political rights of speech, assembly, and petition. This case is of central concern to these *amici* because it addresses the further collapse of constitutional protections for political speech and freedom of association, which lies at the very heart of the First Amendment – particularly for think tanks and other organizations that regularly comment on public policy matters.

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

SUMMARY OF ARGUMENT

1. The constitutional protection offered to citizens banded together under the First Amendment to associate and speak out about referenda measures has been whittled away by lower courts nationwide. This Court should grant review to preserve this indispensable tool of self-governance.

2. Existing judicial standards for protecting associational privacy prove ineffective in the Google Age. Citizens need not wait until they have been injured before their First Amendment rights will be vindicated. This Court should grant review to ensure that associational rights are protected before citizens nationwide suffer additional harm.

ARGUMENT

I. This Much is Clear: Governments Possess No Authority to Bedevil Civic Associations

The First Amendment right of citizens to speak up and reform government is perhaps the most revered component of our civil society. When unshackled, citizens thrust themselves into all sorts of public issues. From Margaret McIntrye, with her anonymous pamphlets opposing a school tax, to the Independence Institute, and its educational website discussing fiscal responsibility, citizens have relied on this Court to protect their constitutionally protected right to gather together and speak. *McIntyre v. Ohio*

Elections Comm'n, 514 U.S. 334 (1995). Were it otherwise, people of common means would lose a most effective custodian of free society: the right of association. *Citizens Against Rent Control v. City of Berkeley* (*Citizens*), 454 U.S. 290, 294 (1981).

Currently, the steady drumbeat of paternalism acts as a basis for limiting key associational and speech freedoms. Self-styled reform organizations (the "Reform Lobby") work with great fanfare to illustrate that citizens should not be trusted with an open trade of ideas in which to discuss the merits of competing policy options. Corruption or its appearance, a supposed distortion of the marketplace of ideas, and egalitarian ideals are all proffered as sound bytes to limit constitutional protections. *See, e.g.*, *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). In many instances courts have adopted these theories to uphold burdens placed on civic groups engaged in referendum advocacy. As recognized in other contexts of the First Amendment, such reporting and organizational requirements impose real burdens on citizens just wanting to speak out, ensuring many will stay home silenced. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

It was not always so. Under this Court's traditional constitutional formula used in campaign finance cases, once political candidates leave the speech equation, we are left with but citizens convincing other citizens about the value of their

positions, for better or worse. In such a field, there is no government justification for state-intervention into the intimate details of civic groups. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1974). And this Court should be loath to find one.

Review is appropriate here because think tanks and civic groups face state-sponsored intimidation when they speak out about referenda and have little recourse in the lower courts. While this Court has been clear that only *Buckley*'s *quid pro quo* form of corruption could serve to limit constitutional rights held by citizens engaged in political speech, lower courts nationwide have been far less consistent in their protection. Routinely, courts apply conflicting standards when assembled citizens seek protection from intrusive state disclosure requirements. *See, e.g., ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1209 (E.D. Cal 2009); *Swaffer v. Cane*, 610 F. Supp. 2d 962, 968 (E.D. Wis. 2009); *Independence Institute v. Coffman*, 209 P.3d 1130, 1141-43 (2009); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1314 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 173-74 (D. Me. 1999). With a roster of upcoming and important referenda items nationwide, review would be beneficial to set the constitutional slate clean, clearing the current chill against associational rights.

A. Colorado's Current Restrictions on Citizen Participation are Part of a Historical Pattern of Legislative Hostility Against Citizens Criticizing the State

Historically, Colorado was a strong proponent of government accountability represented by its referendum process. Some Colorado legislators found the notion of accountability vexing and favored legislative insulation. For example, in 1932, the legislature enacted a discriminatory tax against margarine to protect local dairy interests from competition. Dennis Polhill, INITIATIVE AND REFERENDUM IN COLORADO at 5 (Initiative and Referendum Institute, Dec. 2006). Citizens, mindful of their duty to keep their public servants in check, launched a referendum to strike down the tax increase. Not enjoying oversight, the state legislature thereafter included "safety clauses" to prevent citizens from striking down or modifying laws through the referendum process. *Id.* Between 1933 and 1995, some 18,000 bills included safety clauses to prohibit citizens from countering the will of the legislature. *Id.*

Realizing that the electorate might only tolerate outright bans for only so long, legislators amended the state constitution to make it more difficult for citizens to band together and speak collectively about referenda. According to Article XXVIII of the Colorado Constitution, citizens assembled together who spend or accept more than a paltry $200 to "support or oppose any ballot issue or ballot question" are

required to register as an "issue committee" or "multi-purpose issue committee" and comply with laws regulating them. 8 C.C.R. § 1505-6 (4.15) (2007). Or, should the state find an assembled group of citizens as possessing "*a*" major purpose of supporting or opposing a ballot issue, Article XXVIII imposes registration and compliance requirements. *Id.* These requirements include limits on how much money the gathered citizens may collect in addition to expenditure and reporting requirements – just for coming together to speak about a public issue with other citizens. *See* C.R.S. § 1-45-108(1)(b); 8 C.C.R. § 1505-6(4.15). Colorado requires citizens banded together, so-called issue committees, to disclose anyone who has given as little as $20 so it can post contributors' identities on the Internet. C.R.S. § 1-45-108 & 109.

In the Google Age, this kind of technological voodoo shuts out citizen participation more effectively than a ban ever could. Throughout Colorado's history, the legislature has feared the otherwise healthy criticism of its errant laws. It should remain evident to this Court that Article XXVIII ensures less, not more, accountability for irresponsible legislatures by suppressing speech and association.

B. Imagined Corruption is a Growth Industry, Not a Compelling Government Interest

The founding generation understood that citizens and interests banded together would forever influence

the electoral and policy landscape, and rightfully so. *See, e.g.*, THE FEDERALIST, No. 10 (James Madison) (on the import of factions); John Ehrenberg, *Civil Society: The Critical History of an Idea*, ch. 6 (1999) (Civil Society and Intermediate Organizations). In a free society, associations act as amplifiers, permitting citizens of common means to come together and have an effective voice. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 309 (1984).

In today's political climate, the Reform Lobby has waged a public campaign of fear and loathing against civic associations. Toward that end, the Reform Lobby has been busy conjuring a public campaign even George Orwell would be proud of: Suppression is freedom – association is treason – speech is distortion. Muting some at the expense of others turns into "Clean Elections." *See McComish v. Brewer*, No. CV-08-1550-PHX-ROS, slip op. (D. Az., Oct. 17, 2008) (Order concluding "Plaintiffs have established that the Matching Funds provision of the [Clean Elections] Act violates the First Amendment"). Suppressed speech finds a new home as "equal speech." Supplemental Brief of League of Women Voters in *Citizens United v. FEC*, 08-205 (2009) at 2-3 (in favor of suppression against some to enact "more meaningful political participation" for others). In the plain light of day, these efforts have dampened citizen speech about candidates and, what were previously untouchable, referenda, the next frontier of speech suppression.

In the art of political persuasion, image is everything. Take the example of former Pew Charitable Trusts representative Sean Tregalia. In 2004, he permitted a little truth to slip out when he revealed that Pew and others put millions of dollars into supporting scholarly experts, nonprofits, and media centers to fabricate that Americans were concerned about the appearance of corruption. William A. Schambra, *In a World of Bloggers, Foundations Can Expect More Scrutiny,* Chron. Philanthropy, May 12, 2005 (available at http://philanthropy.com/free/articles/v17/i15/15004601.htm). "The idea was to create an impression that a mass movement was afoot – that everywhere they looked, in academic institutions, in the business community, in religious groups, in ethnic groups, everywhere, people were talking about reform." *Id.* The Reform Lobby, including George Soros's Open Society Institute, invested heavily in these efforts – having spent nearly $123 million since 1994 to get others' money and views out of politics. *Id.*

The Reform Lobby has moved boldly away from preventing corruption to chasing other public policy goals. Just as Colorado legislators did not much appreciate citizen oversight in 1932 and banned reprisal, the Reform Lobby did the same in 2002, when Colorado passed Amendment 27 as the first domino in speech reduction. Assistance came from a variety of Reform Lobby advocates – with total spending on the "yes" campaign amounting to some $163,000. *A Buyer's Guide to Ballot Measures: The*

Role of Money in 2002 Ballot Initiative Campaigns (Ballot Initiative Strategy Center Foundation, March 2003). No matter the spending or groups involved, a constitutional truth remains: The suppression of factions simply does not work. In polling, trust in government increased among Americans after 1979 when national parties were first allowed to raise "soft money" and went up again from 1995 to 2002 during the fastest growth of soft money recorded. Post passage of the Bipartisan Campaign Reform Act in 2002, that trust declined. John Samples, THE FALLACY OF CAMPAIGN FINANCE REFORM, 114-15 (2006). Increasingly, it has been shown that campaign finance restrictions do not increase public confidence in government. David Primo, *Public Opinion and Campaign Finance*, Cato Institute Briefing Paper (Jan. 31, 2001). But the reform lobby remains undeterred.

While the Reform Lobby may rush into states and run effective campaigns to suppress speech and association, this Court should exercise great skepticism in accepting the government interests behind such intrusion. More often than not, hurried campaigns to regulate civic associations stem not from the pursuit of idealistic goals, but from the desire to shut others out of the debate completely. In the realm of referenda, this Court should give instruction to lower courts that the abridgement of speech and association will not be tolerated, no matter how creative the ideas supporting their suppression.

C. Lower Courts Routinely Err by Finding Referenda Related Speech as Posing a Threat of Corruption

Whatever government interests might exist for regulation in candidate-related elections, no similar justifications apply to referendum matters. *Citizens*, 454 U.S. at 299. Indeed, even the limited interests supporting intrusion into citizens' speech about candidates appears to be in decline. *See Citizens United v. FEC*, oral argument transcript at 66 (Roberts, C.J., noting that "we don't put our First Amendment rights in the hands of FEC bureaucrats"). What the *Buckley* Court held as a binding principle 33 years ago remains equally binding today: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." Once the link between contributor and candidate is broken, government's ability to regulate and interfere with political speech is similarly severed. *Citizens*, 454 U.S. at 298-99. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

Just recently, the D.C. Circuit Court of Appeals recognized that pursuant to *Cal-Med Ass'n v. FEC*, 453 U.S. 182, 202-03 (1981) and *Marks v. U.S.*, 430 U.S. 188, 193 (1977), Justice Blackmun's opinion in

Cal-Med is controlling. *Emily's List v. FEC*, 1:05-cv-00049-CKK, Sept. 18, 2009). It provides that "contributions to a committee that makes only independent expenditures pose no threat of actual or potential corruption." *Id.* "By pooling their resources, [citizens] amplify their own voices; the association is but the medium through which its individual members seek to make more effective the expression of their own views." *Id.* In sum, government enjoys no authority to regulate or limit contributions to a non-profit that only makes expenditures – that is, speech about issues of the day.

This Court has continued to recognize that preventing corruption or its appearance are the only compelling government interests identified for restricting campaign finances. *Davis v. FEC*, ___ U.S. ___, 128 S. Ct. 2759, 2773 (2008) (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)) ("'[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'"). While state governments maintain their own interests in regulating candidate committee contributions and expenditures, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens*, 454 U.S. at 299. By making it burdensome for Coloradoans to associate and speak about referenda, Colorado has accomplished indirectly what it is forbidden to do directly.

Outside of the narrow field of referenda campaigns, this Court has stricken laws that limit citizens from associating or speaking in the context of union organizing and charitable solicitations. In *Riley v. National Fed. of the Blind,* this Court would not let stand state-mandated solicitation rules imposed on charities, in part because "we presume that speakers, not the government, know best both what they want to say and how to say it." 487 U.S. 781, 791 (1988) (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987)). Similarly, in *Thomas v. Collins*, this Court stuck down registration requirements for union organizers because of the abridgement of their First Amendment associational rights. The *Collins* Court remained mindful of the presumptive strength liberty enjoys against suppression. 323 U.S. 516, 530 (1945) ("That priority gives these liberties a sanctity" and "it is the character of the right, not of the limitation, which determines what standard governs the choice"). It remains an anomaly how Colorado's registration and disclosure laws targeting civic associations speaking about issues they care about – referenda – could be sustained.

The unfortunate trend in courts below has been to ignore or revamp the core protections recognized by this Court, leading to an array of misplaced standards that do not adequately protect the right of private citizens to associate together privately. *See, e.g.*, *Real Truth About Obama, Inc. v. FEC*, No. 08-1977, 2009 WL 2408735 at *6 (4th Cir. Aug. 5, 2009);

Cal. Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1178-87 (9th Cir. 2007); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 795 (S.D.W.V. 2009); *ProtectMarriage.com*, 599 F. Supp. 2d 1197; *Swaffer v. Cane*, 610 F. Supp. 2d 962; *Broward Coalition of Condominiums, Homeowners Ass'ns & Cty. Orgs. Inc. v. Browning*, 2008 U.S. Dist. LEXIS 91591, at *41 (N.D. Fla. Oct. 29, 2008); *Coffman*, 209 P.3d 1130.

II. The State's Trespassing Eyes Prove Harmful in the Google Age

A. Mandatory Disclosure Poses Real Threats to Liberty, Property, and Security – Including Death Threats, Job Losses, and Bloody Noses

In the landmark case of *Alabama*, this Court recognized that "compelled disclosure of . . . [the NAACP's] membership lists" will "abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs." 357 U.S. at 460. Abridgement of First Amendment associational privacy would lead to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Today, in the context of ballot measure advocacy, abridgement of associational privacy through state campaign disclosure laws continues to chill association in myriad forms.

At the time of the *Alabama* decision African Americans and supporters of the Civil Rights Movement still faced the threat of lynching. *See* Douglas O. Linder, Lynching Statistics by Year, http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html (University of Missouri-Kansas City School of Law). Medgar Evers, a prominent NAACP leader, was assassinated in 1963 and Martin Luther King was assassinated some five years later. *See* Donna St. George, *31 Years Later, Mississippi Seeks Justice for Medgar Evers' Murder*. KNIGHT RIDDER/TRIB. NEWS SERVICE. Jan. 24, 1994; Earl Caldwell, *Martin Luther King Is Slain in Memphis; A White Is Suspected; Johnson Urges Calm*, N.Y. TIMES, Apr. 5, 1968, at 1. While it was private actors who murdered these civil rights icons, governments harassed and intimidated the NAACP. *See, e.g.*, *Dogs, Kids, & Clubs*, TIME, May 10, 1963, at 19. For the NAACP to remain viable and grow to the organization it is today, protection of its rank-and-file membership from forced disclosure and dissemination was essential.

It is important to note the *Alabama* Court's recognition that even lesser harms were sufficient to abridge citizens' associational rights – including the manifestation of public hostility. These harms prove all too frequent to citizens who donate to ballot referenda campaigns today. Following the recent passage of the Proposition 8 ballot measure in California, which amended the California state constitution's definition of marriage, various donors

to pro-Proposition 8 groups faced mob-like organized harassment and intimidation. "Some donors to groups supporting the measure . . . received death threats and envelopes containing powdery white substance. . . ." Brad Stone, *Disclosure, Magnified On the Web*, N.Y. TIMES, Feb. 8, 2009, at A3. Scott Eckern, the director of the California Musical Theater in Sacramento, was forced to resign when anti-Proposition 8 advocates deluged the theater with complaints. John R. Lott Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides*, WALL STREET J., Dec. 26, 2008, at A13. Harassment was not limited to pro-Prop 8 donors: "[a]t least one businessman who donated to 'No on 8' . . . received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the 'Yes on 8' campaign." *Id.*

The damning harms recognized in *Alabama* due to compelled disclosure of membership and donor lists prove all too real in the Google Age. In the case of Proposition 8, all of the injuries at issue in *Alabama* were present, and they continue to be present in ballot advocacy campaigns nationwide. Something has gone decidedly wrong when governments treat referenda supporters in a manner akin to convicted criminals – making private details of their lives available on the Internet.

The twin horrors of harassment and intimidation follow soon after the state intervenes in the private affairs of citizens bound together and forces them to name names. This is especially relevant in a

continued era of rapid technological advancement. Once, it was the practice for secretaries of state to keep ballot measure disclosure records in a central location. Now most states – including Colorado – make these records available on the Internet. C.R.S. § 1-45-108. The implications of this are profound: in some instances, records are copied in their entirety and made available in more prominent locations. *See, e.g.*, Proposition 8 Contributions, http://www.sfgate.com/webdb/prop8/. Effective pairing of state-coerced membership and donor lists with online map websites permits the especially nefarious to pinpoint the locations of individual donors, even in states where the full address of the donor is not disclosed. *See, e.g.*, Eightmaps, http://www.eightmaps.com; KnowThy Neighbor.org, http://www.knowthyneighbor.org. Meanwhile, the Internet itself has become more accessible. Until recently, Internet access was limited to home or office computers. Now, laptops and Blackberries can access the Internet wirelessly from almost any location.

The new national and technological circumstances mentioned allow one's political or social positions to be quickly ascertained almost anywhere at any time, and this "may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and the consequences of exposure." *Alabama*, 357 U.S. at 463. Citizens in California hoping to speak out, for good or bad, about the merits of Proposition 8 suffered the

ill-fate of enduring white powdery substances, forced resignations, and death threats – much as the NAACP did when it developed its organization and public message. The current abridgement of associational rights faced by numerous groups and individuals throughout the United States is more subtle, but nonetheless detrimental, to political speech. Gauging the effect of this chill is next to impossible, for many – indeed, most – affected by this chill are equally afraid to step forward. Nevertheless, this Court should give the chilling effect of disclosure due consideration and reaffirm the First Amendment rights to associational privacy and anonymity.

B. Bruised and Battered Cannot be the Judicial Standard for Protecting Associational Privacy

This Court should not overlook the widespread harm faced by citizens active in ballot measure campaigns due to muddled standards followed by lower courts nationwide. Where significant First Amendment interests are threatened, this Court has liberalized its standards for reviewing such matters because of the "possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In fact, overbreadth challenges have been welcome by this Court where overbroad laws infringing on the right of association would instill a chilling fear into citizens to band together and speak. *See Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

Because citizens face jumbled constitutional standards to protect their associational interests when they raise challenges in courts nationwide, this Court should grant review to clear the constitutional slate for upcoming ballot referenda in 2010.

1. Decisions following NAACP v. Alabama have left the associational right in a hazy bog that restricts associational privacy for ballot measure advocacy without a compelling governmental interest.

This Court described three narrow exceptions to the constitutional right of association in the context of candidate elections in *Buckley*. 424 U.S. at 60-82. These limited governmental interests "outweigh the possibility of [First Amendment] infringement": providing information as to where political campaign money comes from and how it is spent by the candidate, avoiding corruption or the appearance of corruption of the candidate, and enforcing candidate contribution limitations. *Id.* at 66-68.

In *Bellotti*, this Court unequivocally stated that the second interest in disclosure described in *Buckley* does not apply to ballot measures: The "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." 435 U.S. at 790. Likewise, in *Citizens*, 454 U.S. 290, 299-300, this Court overturned contribution limits in ballot measure campaigns, negating the third governmental interest.

Despite this distancing between the government's interest in candidate campaign disclosure and ballot measure campaign disclosure, lower courts nationwide take *Buckley* to mean that ballot disclosure may be upheld based on interests held applicable to candidate elections. *See, e.g.*, *Coffman*, 209 P.3d at 1141-43; *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1314-15 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 173-74 (D. Me. 1999).

If *Buckley* provides a compelling governmental interest supporting disclosure in general, it must be the first interest: "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67. However worthy this informational interest may be, it is not implicated in ballot measure campaigns. Candidates may lie; black letter law does not. Candidates may change positions in response to economic support; the words of a ballot measure do not. This Court has previously stated that "[t]hough [a disclosure] requirement might provide assistance to critics in evaluating the quality and significance of [a] writing, it is not indispensable." *McIntyre*, 514 U.S. at 342 n.5.

A bevy of lower courts nationwide have recklessly expanded *Buckley*'s remaining interest to support everything from educating the electorate, *Richey*, 120 F. Supp. 2d at 1314, to treating citizens as legislators and ballot measure advocates as lobbyists.

ProtectMarriage.com, 599 F. Supp. 2d at 1209; *but see Swaffer*, 610 F. Supp. 2d at 968 ("The government's interest in keeping the public informed of where and how the teetotalers of Whitewater are spending their money to rally support against a liquor referendum is not commensurate with the government's interest in knowing which candidates for public office those same teetotalers financially support."). Given the expanding abuse of ballot measure disclosure to oppress individuals because of their political beliefs and associations in the Google Age, citizens seek this Court's shelter. And because lower courts have consistently upheld coerced ballot disclosure regimes with inconsistent standards, this challenge presents an excellent opportunity to secure and set clear constitutional standards for ballot measure advocacy.

2. Even assuming the government has a compelling interest in ballot measure disclosure, the threshold for exclusion provided by courts is too high to protect associational rights.

Under current trends, to escape disclosure, a minor party must show a reasonable probability of threats, harassment, or reprisals. *Buckley*, 424 U.S. at 74. But this was not always the case. In *Alabama*, this Court recognized that "state action which *may* have the effect of curtailing the freedom to associate is subject to the closest scrutiny" and it did not matter "whether the beliefs sought to be advanced by

association pertain to political, economic, religious or cultural matters." 357 U.S. at 460-61 (emphasis added). Still, the standard for protection morphed over time, requiring citizens to show actual harm suffered before courts would uphold associational rights of privacy. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 99 (1982), this Court affirmed a request for exclusion from disclosure after discussing past oppression in specific terms. It is nearly impossible for any association engaged in ballot measure advocacy to meet this standard. But even if they could, why should associations need to be injured before their constitutional rights will be protected?

Groups that engage in ballot measure advocacy are different in kind from political parties. When a ballot measure arises in a state, it often stands to amend a state's constitution, or at least potentially change a significant law within that state. Though groups may support or oppose a ballot measure for myriad reasons, in the end advocacy rests on urging a vote of "Yes" or "No." Unlike candidate elections, which are cyclical, the results of a ballot measure vote stand indefinitely. Thus, there is often far more at stake in a ballot issue than in a candidate election, and groups such as Independence Institute often get only one shot to make their case in a respective state.

So far, marriage ballot measures concerning the definition of marriage have spawned some of the most blatantly oppressive tactics. Still, other harassment exists. *See* David S. Broder, *Union Dues Initiative*

Causing Divisions for Nevada GOP, WASH. POST, May 5, 1998 at A04 (in a Nevada signature drive, unions against a ballot initiative sent a mailing to rural counties stating "Your names will be turned over to the government"); Steve Suo and Jeff Mapes, *Measure 8 Sponsors Won't List Donors*, OREGONIAN, Dec. 9, 1994 at D09 (advocacy group refused to disclose after public employees threatened to boycott companies that supported a ballot measure); Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared*, WASH. POST, Jul. 1, 2007 at B3 (animal rights activist group used employer information in disclosure filings to compile a list of addresses of Bristol-Meyers Squibb employees, under the heading "Now you know where to find them").

The use of death threats and other tactics was sudden and unexpected in the Proposition 8 campaign. Independence Institute and other groups that engage in ballot measure advocacy should not have to wait to be clubbed over the head to qualify for First Amendment protection. The retrospective nature of disclosure exclusion is troubling enough, but what is worse is that, if one follows *Brown*, it is not until after the votes are tallied that a group such as Independence Institute can even determine if it was of the "minor" opinion in a particular ballot measure, and thus protected. *See ProtectMarriage.com*, 599 F. Supp. 2d at 1216 ("the 'minor party' requirement . . . is very much relevant and in-tact" in a challenge by a ballot measure group). By then, it is far too late: disclosure is an ongoing process leading

up to a ballot measure, and once contributions are published on the Internet they may be freely copied and are likely made available in perpetuity. Finally, while a political party may seek and retain exclusion for some time, expecting Independence Institute to make a reasonable showing in court each time a ballot issue arises in Colorado asks too much of citizens simply desiring to band together and speak. Whether citizens seeking vindication of their associational privacy rights are beaten or bruised should play no role in determining their protection. This sort of regime chills association nationwide – asking citizens to subject themselves to harassment before taking their constitutional rights seriously.

C. Conflicting Anonymity Standards in Courts Nationwide Chill Speech and Limit Association

While the associational right to privacy has been muddled in the fallout of *Buckley*, lower courts have likewise avoided serious consideration of the right to anonymity for ballot measure disclosure in light of this Court's reasoning in *McIntyre*, 514 U.S. 334, and *Buckley v. American Constitutional Law Foundation* (*ACLF*), 525 U.S. 182 (1999), which recognize the protection of anonymity in political speech. At present, the protection granted to anonymous pamphleteering is regarded as not "expansive" enough to translate to protection of the anonymity of contributions for the purpose of issue advocacy. *Coffman*, 209 P.3d at 1142; *Cal. Pro-Life Council, Inc. v.*

Getman, 328 F.3d 1088, 1104 (9th Cir. 2003). But the technological advancements that now permit the widespread, speedy dissemination of donor information call for application of the anonymity recognized in *McIntyre* and *ACLF* to contributions in ballot measure advocacy.

McIntyre affirms that an individual actor's anonymity is protected from disclosure when circulating political pamphlets because "identification of the author against her will is particularly intrusive: it reveals unmistakably the content of her thoughts on a controversial issue." 514 U.S. at 355. In *ACLF*, this Court recognized the right to anonymity in circulating a petition for a ballot initiative. 525 U.S. at 197-200. Both cases leave room for campaign disclosure in line with *Buckley*: "Disclosure of an expenditure and its use, without more, reveals far less information. . . . [E]ven though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill – and as a result . . . it is less likely to precipitate retaliation." *McIntyre*, 514 U.S. at 355. Following *ACLF*, affidavits disclosing the circulator's name and address are permitted, but requiring a circulator to wear a nametag is not, because "[t]he affidavit . . . does not expose the circulator to the risk of 'heat of the moment' harassment." *ACLF*, 525 U.S. at 199 (citing *American Constitutional Law Foundation v. Meyer*, 870 F. Supp. 995, 1004 (Colo. 1994)).

Ballot measures are specific acts of legislation. This Court should recognize that the associational rights of citizens donating to ballot organizations

enjoy no less constitutional protection than writing a pamphlet advocating a position. Disclosure of a ballot measure campaign contribution effectively eradicates a citizen's ability to associate quietly while serving no defined governmental interest. Furthermore, the ability to instantly access disclosure provisions almost anywhere at any time over the Internet makes ballot measure disclosure a tool for purposes of retaliation or harassment, both long-term and in "heat of the moment." These conditions paint a scenario implicating this Court's need to clarify the protection of individuals who wish to donate to ballot measures anonymously in the tradition of *McIntyre* and *ACLF*.

This Court should vindicate the right to anonymity recognized in *McIntyre*. *Alabama, ACLF,* and *Bellotti* are proper precedent to assist this Court in narrowing ballot measure disclosure to protect First Amendment anonymity. In *Alabama*, this Court noted that "[the NAACP] has not objected to divulging the identity of its members who are employed by or holding official positions with it. It has urged the rights solely of its ordinary rank-and-file members." 357 U.S. at 464. In *ACLF*, this Court affirmed the unconstitutionality of disclosing amounts paid to petition circulators while affirming the disclosure of ballot initiative sponsors, or those who pay the circulators and how much they pay. 525 U.S. at 204-05.

The Independence Institute likely agrees with the NAACP in this fashion: it lists its staff members, board of trustees, center directors, senior fellows and

research associates on its website, www.i2i.org. As an organization, Independence Institute is willing – more likely proud – to be identified with its positions. But this does not waive the right of its rank-and-file members to keep their support of the Independence Institute anonymous. "Identification of the source of [corporate] advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32. Surely this Court did not intend each individual employee or donor to a corporate non-profit to be included in such disclosure.

First Amendment associational rights and the right to speak anonymously do not provide an absolute right to anonymity or absolute protection from all unpleasant forms of engagement. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Using bumper stickers, yard signs, buttons, or voicing an opinion without taking steps to protect one's anonymity quickly surrenders that right. It is important to emphasize, however, that much of the recent oppressive acts in ballot measure campaigns and the growing chill on ballot measure advocacy is made possible only because of state coerced disclosure. If one's anonymity is compromised through carelessness or other means, the First Amendment does not provide a blanket to which he or she may retreat. However, until one waives their right, it is not the place of government to force those who wish to speak anonymously out into the open.

Currently, in regard to both associational rights and anonymous speech, it is regulation, rather than speech, that dominates. Associational privacy is protected only for minor groups who face overwhelming hostility, leaving recognized, popular advocacy groups unprotected until their support and clout is whittled into obscurity. Likewise, anonymity belongs to an individual, but should that individual seek to band together with like-minded persons in the political arena or support a group committed to one or many issues, the law immediately sacrifices anonymity. This Court should grant review to clarify judicial errors in this subject of controversy nationwide and to ensure that the right of association remains protected.

CONCLUSION

For the foregoing reasons, the Cato Institute, Wyoming Liberty Group, and assembled *amici* respectfully request this Court to grant the petition for certiorari.

Respectfully submitted,

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